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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DENNIS JAMES VICTORIAN, Defendant and Appellant.	B180792 (Los Angeles County Super. Ct. No. BA252546)

APPEAL from a judgment of the Superior Court of Los Angeles County, Judith L. Champagne, Judge. Affirmed.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc E. Turchin and Richard S. Moskowitz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant appeals from a judgment of conviction following a jury trial. The jury found defendant guilty of first degree burglary (Pen. Code § 459[1]), second degree robbery (§ 211), and assault with a deadly weapon (§ 245(a)(1)). The trial court found true the allegations defendant suffered four prior serious felony convictions (§§ 667, subds. (a), (b)-(i)) and served six prior prison terms (§ 667.5, subd. (b)). The court struck the prior prison term enhancements and sentenced defendant to state prison for a term of 45 years to life.

Defendant challenges the trial court's denial of his *Faretta*[2] and *Marsden*[3] motions; its refusal to declare a mistrial and its discharge of a juror for refusal to deliberate; and its instruction on reasonable doubt. We affirm the judgment.

FACTS

Ramon Crisolo (Ramon) lived with his parents and his daughter, Amber, in a house on the 5800 block of Virginia Avenue in Hollywood. Ramon's brother, Edmund Crisolo (Edmund), had moved out of the family house and lived in an apartment with his girlfriend. He returned to the house regularly to help his parents.

On the morning of August 27, 2003, Ramon was the last person to leave the house, leaving at about 9:00 a.m. Before leaving, Ramon locked and secured the front door and the rest of the house. The house had a security door in front and security bars and latches on the windows.

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[1] Unless otherwise indicated, all further section references are to the Penal Code.

[2] *Faretta v. California* (1975) 422 U.S. 806.

[3] *People v. Marsden* (1970) 2 Cal.3d 118, 123.

Edmund arrived at the house about an hour later to drop off a couple of chairs for his parents. As he was carrying the chairs towards the side of the house, he heard a noise coming from inside the house, like someone moving around. He then heard the front security door slam. He went to the front of the house and saw defendant run from the house and out to the street. Defendant was wearing a windbreaker and carrying two bags over his shoulder, a green one and a red and blue one.

Defendant turned south on Bronson Avenue. Edmund ran after him for a brief period of time, then returned to his car and tried to follow defendant. He lost sight of defendant at the intersection of Bronson Avenue and Santa Monica Boulevard. He parked his car and began looking for defendant. Less than a minute later, he saw defendant walking towards a trash bin, where there was a shopping cart containing three bags. Defendant had removed his windbreaker and was wearing a gray tank top. As defendant began pushing the shopping cart toward the street, Edmund confronted him, saying he had seen defendant leave the Virginia Avenue house. Defendant asked what he was talking about. Defendant took the bags out of the shopping cart and tried to walk away, but Edmund kept blocking his path.

Edmund accused defendant of taking things from his parents' house and demanded that defendant return them. Defendant denied the accusation. Edmund demanded that he open the bags. Defendant knelt down and opened the red bag, revealing items belonging to Ramon and Amber. He then threatened to "stick" Edmund. He pulled out a knife and drew it from its sheath. Edmund managed to grab the knife by its handle and take it from defendant. Defendant grabbed one of the unopened bags and ran off. Edmund tried to follow defendant, but lost sight of him.

About five minutes later, Edmund flagged down a police car and provided Los Angeles Police Officer Rene Santos with defendant's description. Officer Santos broadcast defendant's description. Edmund got into the back of the police car, and Officer Santos drove around the area, looking for defendant. Edmund also directed Officer Santos to the location where he left defendant's knife, and the officer recovered the knife.

Sergeant David Mascarenas heard Officer Santos's broadcast and located defendant in a restaurant. Defendant appeared nervous and agitated and was sweating profusely. Sergeant Mascarenas took defendant outside for a field show-up. Officer Santos transported Edmund to the restaurant. Edmund immediately identified defendant as the person he saw leaving his family's front yard.

Defendant was taken to the police station where he was searched. Officers found a glass pipe used for smoking cocaine in defendant's left front pocket. They found jewelry and other items in defendant's other pockets. Edmund later identified these items as belonging to his mother.

Officers took Edmund back to the Virginia Avenue house. The bars on one of the rear windows were open. Several rooms appeared to have been ransacked. Ramon returned home at about 1:00 p.m. He too noticed the house had been ransacked and a number of items were missing.

Defense

Defendant lived with his mother in the Crenshaw area until May 2003, when he moved to the Dunes Hotel on Sunset Boulevard in Hollywood. He smoked rock cocaine at times and he engaged in prostitution to pay for his hotel room.

Defendant met Edmund on Santa Monica Boulevard at 1:00 a.m. early in June 2003. The area was a gathering place for drug users, and defendant was looking to purchase drugs. Edmund introduced himself as "Robert" and asked if defendant got high. When defendant said that he used "crack," Edmund asked if he knew where to get some. Defendant said he was going to get some too, and he offered to let Edmund accompany him. They agreed to pool their money so they could get more drugs. As they were walking, Edmund said that he had a car. Defendant suggested they go to his "people" in the Crenshaw area. Edmund drove defendant to the Crenshaw area, where defendant bought some cocaine. They then went to defendant's hotel room, where they watched movies and got high on the drugs.

Four days later, Edmund appeared at defendant's hotel room. Defendant asked what he was doing there. Edmund handed him $300 and asked him to buy more drugs. Defendant went out and purchased the drugs. When he returned, he and Edmund got high. Edmund returned to defendant's room a number of times thereafter. The first few times, he and defendant merely got high together. The fourth time Edmund returned, he paid defendant to engage in sexual activity with him.

One day when defendant and Edmund were getting high, Edmund ran out of money. He said he left his wallet at home. He drove defendant to the Virginia Avenue house, went inside and returned with his wallet. He then drove to an ATM and got money. He and defendant bought more drugs and returned to defendant's hotel room. Another time when Edmund and defendant ran out of money, Edmund drove them to the Virginia Avenue house. He went inside and got some money while defendant waited in the car.

On the morning of August 27, 2003, defendant had been "up for a couple of days." He was out of money and realized that he had to pay his hotel bill by noon. He did not want to ask his mother for money, in that she would have asked for an explanation. He telephoned Edmund and asked if he could come to the Virginia Avenue house and get some money. Edmund said he would help defendant.

When defendant arrived at the house, Edmund invited him in. Edmund was in his underwear. He took defendant to Ramon's room, where he was looking at nude pictures on the computer and getting high. Defendant said he needed money and did not have much time. Edmund told defendant to give him a minute to get ready. It seemed to defendant, however, that Edmund was not going to leave and get him the money. Defendant became upset, said he had to pay his hotel bill by noon and began to leave. Edmund told him to wait. He went to another room then returned with a handful of jewelry. Defendant asked what he was supposed to do with the jewelry; Edmund told him to take it to a pawnshop and get money for it. Defendant got upset that Edmund would not help him. Edmund told him to wait, but defendant told him he was leaving and he did not want Edmund to come to his room anymore.

Edmund began running around the house, gathering items and putting them in a blue duffel bag. He offered them to defendant. Defendant put some of the items in his own bag and the jewelry in his pocket. Edmund asked if they could see each other later. Defendant said he would probably pay his hotel bill then go to buy drugs. Edmund suggested they meet at a restaurant and then go to defendant's hotel room.

Defendant went to the restaurant. He was waiting for his food, when the police arrived. They handcuffed him and placed him in a police car. He asked what was going on. They said he was there for an identification. The police car in which Edmund was riding then arrived.

CONTENTIONS

Defendant contends that denial of his October 19, 2004 *Faretta* motion violated his constitutional rights under the Sixth and Fourteenth amendments and constituted reversible error per se. We conclude the court properly denied the motion as untimely and made for the purpose of delay.

Defendant also contends that the trial court's dismissal of a dissenting juror for refusal to deliberate was a prejudicial abuse of discretion and violated his constitutional right to a unanimous verdict. He adds that the court erred in refusing to declare a mistrial based upon the misconduct of other jurors. We find no error in the trial court's dismissal of the juror and refusal to declare a mistrial.

Defendant further asserts that the trial court's amplification of the concept of reasonable doubt had the effect of reducing the standard of proof and was reversible error. There was no erroneous amplification of the concept of reasonable doubt.

Finally, defendant avers that the trial court deprived him of his constitutional right to the effective assistance of counsel in denying his *Marsden* motion, made on the ground that his counsel's failure to make a *Wheeler*[4] motion violated his right to effective

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[4] *People v. Wheeler* (1978) 22 Cal.3d 258.

assistance of counsel. He further contends he was denied due process and equal protection of the law by the exclusion of Black potential jurors from the panel. We conclude the trial court did not abuse its discretion in denying defendant's *Marsden* motion. Additionally, defendant established no basis for relief based on counsel's failure to make a *Wheeler* motion.

DISCUSSION

Faretta Motion

Defendant initially was represented by the public defender's office. On January 7, 2004, defendant made a *Marsden* motion to obtain new appointed counsel, which was denied. On February 4, the trial court granted defendant's motion for a continuance to interview additional witnesses and determine if there was a conflict with the public defender. On February 10, the public defender's office declared a conflict and the alternate public defender was appointed. On March 29, the trial court heard defendant's petition for writ of habeas corpus based on ineffective assistance of counsel. The trial court denied the petition, ruling that defendant's claim of ineffective assistance of counsel was moot because the public defender had declared a conflict and no longer represented defendant.

On June 9, 2004, the trial court heard and denied defendant's second *Marsden* motion. Subsequently, defendant made a *Faretta* motion to represent himself. After the court advised defendant of the potential consequences of self-representation, defendant withdrew his motion.

The trial court denied defendant's third *Marsden* motion on June 24, 2004. Defendant made a second *Faretta* motion. The trial court granted the motion and appointed standby counsel for defendant. Then on July 29, defendant withdrew his pro. per. status. The court appointed defendant's standby counsel, Alan Kessler, to represent him.

The trial date was continued or trailed for various reasons until October 19, 2004. Five minutes before jury selection was to commence, defendant moved to reinvoke his *Faretta* rights and to proceed in pro. per. The court told defendant that it could not continue the case indefinitely, that both sides had a right to a timely trial. "We are going to get started in the next five minutes. You are ready to proceed?" Defendant said he was not; he had a motion for a continuance. The court told him it was going to deny his motion, in that they were going to begin jury selection within five minutes. It further explained: "You had a previous opportunity to represent yourself. You asked for counsel to be appointed. At this point I can only view your current motion as a delaying tactic. I have a responsibility to see that this case moves in a proper and efficient manner. We will begin the trial within a few minutes. Mr. Kessler will continue to represent you. I think if you make an effort to work with him, it will certainly be to your advantage."

Defendant complained, "Mr. Kessler has had my case for quite some time. You know, I am fully aware Mr. Kessler has a life and a business and he has things he has to do outside my case. Mr. Kessler has not paid attention to my case what is necessary and needs to be done." The trial court interpreted defendant's comments to be a *Marsden* motion. The court held a hearing and denied the motion.

Under *Faretta v. California*, *supra*, 422 U.S. 806, 819-821, a defendant has the "right to represent himself if he voluntarily and intelligently elects to do so." (*People v. Burton* (1989) 48 Cal.3d 843, 852.) However, the right of self-representation must be invoked within a reasonable time prior to the commencement of trial. (*People v. Horton* (1995) 11 Cal.4th 1068, 1110; *Burton*, *supra*, at p. 852; *People v. Windham* (1977) 19 Cal.3d 121, 128.) If a *Faretta* motion is not made within a reasonable time prior to the trial's scheduled commencement, its grant or denial is within the trial court's sound discretion. (*People v. Clark* (1992) 3 Cal.4th 41, 98; *Burton*, *supra*, at p. 852; *Windham*, *supra*, at p. 128.) If the court's discretion has been abused, reversal is required only if it is reasonably probable the defendant would have received a more favorable result absent the abuse. (*People v. Nicholson* (1994) 24 Cal.App.4th 584, 594-595; *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050.)

The "'reasonable time'" requirement is necessary "to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice." (*People v. Burton*, *supra*, 48 Cal.3d at p. 852; accord, *People v. Horton*, *supra*, 11 Cal.4th at p. 1110.) If the motion is made just prior to trial, necessitating a continuance in order to allow the defendant to prepare adequately for trial, the defendant should make some showing of reasonable cause for the late request for self-representation. (*Burton*, *supra*, at pp. 852-853; *People v. Windham*, *supra*, 19 Cal.3d at p. 128, fn. 5; see also *Horton*, *supra*, at p. 1110.) In deciding whether or not to grant the motion, the trial court should consider such factors as whether the defendant is ready for trial or will need a continuance in order to prepare, the delay or disruption the continuance would cause, the quality of representation the defendant has received from counsel thus far, the defendant's prior proclivity to substitute counsel, the reasons for the request to dispense with counsel, and the length and stage of the proceedings. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1320; *Burton*, *supra*, at p. 853; *Windham*, *supra*, at p. 128.)

Defendant's *Faretta* motion made five minutes before trial was scheduled to begin was untimely. Considering that defendant made no showing of reasonable cause for his late request, requested a continuance in order to prepare for trial, and had demonstrated a proclivity to make motions to substitute counsel and represent himself, the trial court did not abuse its discretion in denying the motion. (*People v. Burton*, *supra*, 48 Cal.3d at pp. 852-853; *People v. Windham*, *supra*, 19 Cal.3d at p. 128.)

Dismissal of Juror/Denial of Mistrial

Deliberations began late in the morning on October 28, 2004. At 3:25 p.m., the jury foreperson, Juror No. 3, sent the following note to the court: "We are 11 to 1 on Burglary—it appears that we are not going to change opinions at this time—what do we do? We are starting to personally attack each other." The trial court wrote back: "Perhaps a good night's sleep will allow all of you to take a fresh look at the evidence

and instructions when you return tomorrow. You may recess early and are reminded not to discuss the matter with anyone."

Deliberations began the following day at 9:35 a.m. At 11:10 a.m., the trial court received the following note from Juror No. 9: "Determination of a Mistrial—

"Thurs 10·28·04 11am-12n Jury unanimously selected foreperson who evidenced prior legal knowledge. After secret ballot, all 11 jurors offered opinions on trial & their concerns. Foreperson then announced that she believed defendant was entirely innocent, based on defendant's (unsupported) testimony. She finds People's witnesses un-credible. We went to lunch.

"From 130-300pm, a long, detailed discussion ensued re charge #1, burglary, with all jurors participating. Foreperson rejected all opinions other than her own. She was asked 'Is there anything that will change your mind?' She replied, 'No!' [¶] In a majority vote, 11 jurors could reconcile differences within a reasonable amount of time. In the face of blind intransigence, we will never be able to achieve unanimity. [¶] My question is: [¶] Is this foreperson preventing a miscarriage of justice, or abetting it?"

Juror No. 3, the foreperson, then was brought into the courtroom at her request. She told the court, "[W]e are at a standstill. It started yesterday where it became quite personal and I don't think I can continue on this case. Um, I am a strong person, but when seven people are yelling at me telling me that I am wrong and bringing up stuff that was in voir dire, personal information about myself, I cannot continue. [¶] I don't want that kind of abuse because my opinion varys [*sic*]. I am letting people speak. I am listening to them. Instead I am being told I am wrong and I am incorrect and that I feel this way because I was raped or because I have been in an abusive relationship.

"This is completely inappropriate, completely immature. The jurors this morning, some of them would not even look in my direction. When I said good morning, you know, no one was not looking at me. When I just returned from break, they were holding deliberations as to how to get rid of me off the jury. Not all of them were present, but eight of them were. I, at this point, I don't want to continue with this because I mentally and emotionally don't think I can handle this. This is not okay. This is a miscarriage of

justice so far as what is going on inside there, and personal slams against me has nothing to do with this case. And they just informed me that they are going to ask you to have me removed from the jury. I said that is wonderful. This morning I asked to speak to the judge for the exact same reason. I don't know what that says but I can only imagine."

The court asked Juror No. 3 if she thought it possible to "continue to interact with the other jurors," "to discuss the evidence, to discuss the instructions?" The court noted that she was emotional and crying. "We certainly don't wish to put anyone in a position that causes them to become so upset. That isn't, of course, our desire for any of the jurors to feel that it is torture to serve. [¶] Do you think it is possible for you to be able to continue in the jury room?"

Juror No. 3 responded, "No. No, I do not. I mean it is deadlocked and although I keep saying can you guys, can you folks prove this to me and I will talk about evidence that has been brought in. It is not speculative evidence. It is not well, this could have happened or this could have happened. I tried that technique yesterday. I tried playing devil's advocate yesterday. [¶] I was also elected foreperson. This is also very difficult. There is nobody there always a mediator. This is not about me against them. That is what it has come to. That is what is going on in there."

The court reminded Juror No. 3 of the jury instructions then asked her if she had "taken a careful look to make sure that nothing in the way of personal experience is interfering with your objectivity?" She assured the court that she had looked at the evidence and asked the other jurors for help on certain points about which she was confused. The court asked if she would be able to continue deliberations if someone else were made foreperson. She responded, "I thought about that. I don't think so. At this point it is almost like a lynch mob in there. It is not a friendly environment whatsoever."

The trial court told Juror No. 3 that it was not unusual for deliberations to become heated. It asked her, "What I need to know is since it took over a week to present the case, we would hope that the jurors would be willing to continue to talk and to share and to consider, but I need you as well as the rest to do that. I am not quite certain I am hearing whether or not you are willing to try." Juror No. 3 told the court, "I've tried. I'm

maxed out, your Honor. It's one thing when we are talking a huge discussion about the case and about evidence. It is another when they start talking about my personal life." She assured the court that she never brought up her personal experiences in talking to the other jurors. They brought up the matter.

The court asked, "Can you see any way in which you would be willing to continue to talk with the other jurors?" Juror No. 3 replied, "No. At this point, no. Your Honor, I don't cry very often. I am completely frustrated and I am done." The court asked, "What do you want to do? Are you asking to be excused?" Juror No. 3 said, "I think I am. I was not expecting it to become so nasty in there and for the people—granted they want to go home. I want to go home. I have lost a lot of money on this case, money I would normally make by working. That is not where my head is at this point. My head is there is somebody on trial. Let's look at the case. Let's look at the facts. I am not in such a rush to get out of it."

Juror No. 3 added that if she remained on the jury, "it is going to remain exactly the way it is currently." The court told her, "I am less concerned about that than I am about your[] emotional state." Juror No. 3 said she was "not happy." The trial court said, "A lot of times people can continue even if it is uncomfortable. I am asking if you can continue even if you feel uncomfortable?" Juror No. 3 answered, "I have no desire to continue. Absolutely no desire."

The trial court pressed her, "I understand that you would prefer not to. Do you see any way that you could put aside what's gone on up until now and try with a fresh open mind to look at the evidence?" Juror No. 3 told the court, "That is what I did this morning, your Honor." The court asked, "Are you telling me you can't do that?" She stated, "I have exhausted my resources on this."

Juror No. 3 then returned to the jury room, and Juror No. 9 was brought into the courtroom. The court asked the juror to explain the problem. Juror No. 9 stated, "Essentially we started yesterday after lunch as soon as we were dismissed for deliberations in the customary way which was discussing person by person around the table. What each person's concerns were about the testimony. What we felt was

incomplete. What we felt was not inconsistent. When all 11 jurors had finished the discussion which took about an hour, the foreperson, who we had elected unanimously, stood up and said that she felt that the defendant was completely innocent of all charges, which surprised us.

"We went to lunch. Between 1:30 and 3 o'clock we had a thorough discussion of the burglary charge. . . . The foreperson would not agree with any of it. We asked her—I don't think it may have been me—is there anything that would make you change your mind and she said no. This is when we first requested—sent a communication—she sent a communication regarding a mistrial.

"The same thing has happened today. I am hoarse from talking. . . . I had intended to suggest[] that we drop burglary and go to robbery. Instead people seem to want to continue with burglary. We rehashed the same thing over and over for the last hour, hour and a half. The position is the same. Eleven of us feel one way. She feels another. She is unwilling to work with us. We are unable to reach a unanimous verdict. . . ."

The court asked Juror No. 9, "Is there anything at all that Juror Number 3 has said or done that suggests that she is not relying on the evidence and the instructions, even though her point of view is different?" Juror No. 9 responded that "[e]leven of us found the People's witnesses to be credible and Juror Number 3 does not. Juror Number 3 finds the defendant credible and explicitly finds the People's witnesses are not." The court tried rephrasing its question, and Juror No. 9 answered, "Well, in discussing the evidence as we have done bit by bit and over and over from the point of view of the People's witnesses, her continual response is yes, but what if. Does that make sense? There is a great deal of speculation from the point of view of the defendant."

The court asked, "Do you think it is possible for the 12 of you to continue any kind of productive interaction?" Juror No. 9 responded, "Honestly, no. Eleven of us could. The 12 of us cannot. If you brought out anyone else from the jury room remaining they would tell you the same thing. We have been going in circles since yesterday afternoon." The court then sent Juror No. 9 back to the jury room.

The court asked counsel for their views on how they should proceed. It observed that the jurors "have not deliberated for an extensive period. It sounds as though Juror Number 3 doesn't want to continue at all. Juror Number 9 doesn't believe that it is going to be productive. Juror Number 3 doesn't feel that she is able to proceed. The decision has to be made whether a mistrial is declared at this early stage or not."

Defense counsel opined that Juror No. 3, as well as the other jurors, had deliberated properly. Unfortunately, the deliberations had "turned into a personal attack" on Juror No. 3's character, which she could not take anymore. Further deliberations would not be productive. If the court removed her from the jury, however, "you would be removing her because she doesn't agree with [the rest of the jurors] and you can[not do] that."

The prosecutor argued that due to Juror No. 3's emotional state, it did not "appear that there has been a fruitful deliberation from some time . . . yesterday late morning or yesterday afternoon." It was clear that Juror No. 3 was unwilling to continue deliberating. At this point, it was "not simply a matter of a group feels one way and somebody else or another group feels another way. There has been a turning point at which actual reasonable deliberations were no longer continuing." Inasmuch as the jury actually had deliberated only three or four hours on a case that took three or four days to present, the prosecutor believed it was too early to declare a mistrial.

The court decided to bring the entire jury out "and remind them of the instructions about how they should approach their task and ask them to make one last effort to try and deliberate, avoiding all personal attacks and just focus on the evidence and to let us know at noon whether there is any purpose to be served by continued deliberations." The court brought the jury back into the courtroom, read CALJIC No. 17.41 on how the jurors should approach their task, and added, "If it is possible, we would like you, even if you change the role of foreperson at this point, maybe pick another one. Take turns being the foreperson. Engage in your deliberations as best you can, of course, avoiding all personal attacks. [¶] It is 20 minutes to 12:00. If you would be willing to work for the rest of the morning and then submit a letter, a brief note this afternoon, we'll be able to make a

decision as to how we can proceed at that point. [¶] Can I ask you all to do that for the balance of the morning? All right. Thank you."

As the jury left the courtroom, Juror No. 3 asked to remain. She told the court, "I cannot go on with this case. I cannot." The court told her that "there is only a short time left this morning. Eleven other people have agreed that they will attempt to fulfill their responsibilities, approach their tasks in accordance with the court's instructions. I am going to ask you to do the same. The only other thing I can do is excuse you, which I [would] rather not do. I would like to see you try and hang in there and discuss with an open mind as objectively as you can, as a judge of the facts, considering other views as well as sharing your own."

Juror No. 3 stated that she understood the court's position, "however, I am to a point now I'm emotional and not logical and I am not good to anybody at this point." The court tried to ask her if there was any way she could put aside her emotions, but she interrupted, stating, "You know, just now, when the other juror who had spoken to you came back in the room he gave a high sign to another juror and patted her on the back. Your Honor, I don't want to be around the people in there. I see no way we are going to come together. I see no way that we are going to be able to reasonably make a decision and talk humanely to each other. I see no way. [¶] I do not believe in personally attacking people. It is not my style[.]"

The court reiterated that the other jurors had agreed to try and deliberate without making personal attacks. "Don't you think you could do the same? I guess the answer is either yes or no." Juror No. 3 answered, "No." The court excused her.

At that point, defense counsel again requested a mistrial. The court refused to grant one, stating, "Eleven people said that they would spend the balance of the morning doing their best to try and look at the evidence and she refuses to do that. She wouldn't even allow another 20 minutes in order to try to fulfill her responsibilities. I can't physically force someone to do it."

The court replaced Juror No. 3 with an alternate and instructed the jury to begin its deliberations anew. Defense counsel requested the opportunity to be heard. The court

agreed that there were problems in the jury room. It stated that had Juror No. 3 "been willing to try and at some point at the end of the morning they were still at an impass[e], then I would have felt very differently about declaring a mistrial. There is still her refusal to even go back in the room and make any effort."

Defense counsel asked the court to inquire of the other eleven jurors whether they discussed Juror No. 3's personal background. It was obvious to defense counsel that the other eleven jurors held a grudge against Juror No. 3 and "she was drummed out" of the jury because she found defendant credible and would not change her mind. The trial court reiterated, "No, she was not drummed out. She was excused by the court when she said she would not make the last effort to sit down for the balance of the morning, which at that point was 15 minutes and try and engage in the deliberation process for the balance of the morning. That is why the court excused her. Had she been willing to join the others and make some effort to communicate and deliberate, as I have indicated, the court would not have excused her. It was her own request and her own refusal to go back in the jury room."

That afternoon, the court brought Juror No. 9 into the courtroom and asked if anyone on the jury was verbally abusive to Juror No. 3. Juror No. 9 said the "[t]he deliberations were heated, but not in a personal way." The court then asked if he recalled anyone bringing up Juror No. 3's personal experiences that she had discussed during voir dire: "Anything having to do with physical abuse or anything of that nature?" Juror No. 9 responded: "No. One juror, not me, said at one point you are putting your own personal experiences into this or you are projecting your own personal experiences into this. That was one time." The court then returned Juror No. 9 to the jury room.[5]

Defense counsel reiterated his position that Juror No. 3 had deliberated properly, and it was clear there was a hung jury. The court disagreed, again stating that Juror No. 3

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[5] The trial court later denied defendant's motion for a new trial based on the trial court's refusal to declare a mistrial.

was refusing to deliberate and therefore had to be replaced. The jury reached a verdict later that afternoon.

Section 1089 provides that a trial court may discharge a juror and replace him or her with an alternate if the juror is found to be unable to perform his or her duty. On appeal, we review the decision to discharge a juror and replace him or her with an alternate for abuse of discretion. (*People v. Marshall* (1996) 13 Cal.4th 799, 843; *People v. Johnson* (1993) 6 Cal.4th 1, 21.) If there is any substantial evidence supporting the trial court's decision, it will be upheld. (*Marshall*, *supra*, at p. 843; *Johnson*, *supra*, at p. 21.) However, the juror's inability to perform his or her duty "must '"appear in the record as a demonstrable reality."'" (*Marshall*, *supra*, at p. 843; *Johnson*, *supra*, at p. 21.)

A finding of inability to perform the duties of a juror may not be based on the juror taking a position contrary to that of the other jurors (*People v. Hamilton* (1963) 60 Cal.2d 105, 128, disapproved on other grounds in *People v. Daniels* (1991) 52 Cal.3d 815, 866) or questioning the sufficiency of the prosecution's evidence (*U.S. v. Thomas* (2d Cir. 1997) 116 F.3d 606, 622 and fn. 11). "[R]emoval of the sole holdout for acquittal" threatens "the heart of the trial process." (*U.S. v. Hernandez* (2d Cir. 1988) 862 F.2d 17, 23.) Allowing a juror to be discharged for such reasons "would fail to protect adequately a defendant's right to be convicted only by a unanimous jury." (*U.S. v. Brown* (D.C. Cir. 1987) 823 F.2d 591, 596.)[6]

People v. Cleveland (2001) 25 Cal.4th 466 addresses the standard to be employed in deciding whether to dismiss a juror for failure to deliberate. The court defined refusal to deliberate as "consist[ing] of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by

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[6] The United States Supreme Court has held that the United States Constitution does not require conviction by unanimous jury (*Apodaca v. Oregon* (1972) 406 U.S. 404, 406), but the California Constitution provides the right to a unanimous jury (Cal. Const., art. I, § 16; *People v. Green* (1995) 31 Cal.App.4th 1001, 1009).

listening to their views and by expressing his or her own views. . . . The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge. Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge. A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views." (*Id*. at p. 485.)

The trial court made it clear that Juror No. 3 was not being dismissed for her disagreement with the majority or her belief that further deliberation would not alter her views. It dismissed her because, due to her emotional state, she physically refused to go back into the jury room and deliberate after the court reinstructed the jury and requested that they deliberate for the remainder of the morning.

Juror No. 3's inability to perform her duty """"appear[s] in the record as a demonstrable reality."""" (*People v. Marshall*, *supra*, 13 Cal.4th at p. 843; *People v. Johnson*, *supra*, 6 Cal.4th at p. 21.) It is true that Juror No. 3 had engaged in deliberations up to a point. Although the jury appeared to be deadlocked on the burglary charge, it had not discussed the other charges. The trial court requested a brief additional period of deliberations following reinstruction and agreement by the other eleven jurors to do their best to deliberate without making any personal attacks, just focusing on the evidence. At that point, Juror No. 3 refused to continue deliberating. These circumstances provide substantial evidence supporting the trial court's finding that Juror No. 3 was refusing to deliberate for a reasonable period of time and needed to be dismissed. (§ 1089; *People v. Cleveland*, *supra*, 25 Cal.4th at pp. 474, 485.) The court therefore did not abuse its discretion in dismissing her. (*Marshall*, *supra*, at p. 843; *Johnson*, *supra*, at p. 21.)

Defendant further contends that, in any event, the trial court erred in refusing to grant a mistrial based on jury misconduct. This contention is based on Juror No. 3's

statement: "When I just returned from break, they were holding deliberations as to how to get rid of me off the jury. Not all of them were present, but eight of them were." It also is based on the other eleven jurors' note to the court, which Juror No. 3 apparently did not see. ("I don't know what that says but I can only imagine.")

Assuming arguendo that this was misconduct, it was not prejudicial and did not require the granting of a mistrial. The actions of the other jurors could not "have produced any significant effect on the jury's deliberations or the ultimate verdict. There was no realistic possibility that the vote of one or more jurors was influenced by exposure to any prejudicial extrinsic matter. Even if the deliberations of the first jury were somehow suspect, that jury did not decide the case. After dismissing Juror No. [3] and replacing her with an alternate, the trial court strongly admonished the newly reconstituted jury to begin its deliberations again, as though no deliberations had yet taken place at all. . . . On these facts, we must presume that the jury followed the court's instructions." (*People v. Dorsey* (1995) 34 Cal.App.4th 694, 704.)

Defendant finally argues that, even if the alleged misconduct does not compel reversal of the judgment, the case should be remanded for a further hearing into the question of juror misconduct. He bases this argument on his Fourth Amendment right to a fair trial and his Sixth Amendment right to the effective assistance of counsel.

We find no abuse of discretion in the trial court's failure to conduct a further inquiry. (*People v. Castorena* (1996) 47 Cal.App.4th 1051, 1065.) It was made aware of the extent of any misconduct—which involved the relationship between the other jurors and Juror No. 3 and no actual deliberations on the case. Further inquiry could only confirm that which it already knew—that the other jurors were taking action to attempt to get Juror No. 3 off the jury outside of her presence. (See *People v. Barber* (2002) 102 Cal.App.4th 145, 151.) It addressed the situation by instructing the jurors to continue deliberations together, without making any personal attacks, for a short period of time. And, of course, once Juror No. 3 was dismissed and replaced with an alternate, deliberations began anew, unaffected by any previous misconduct. (*People v. Dorsey*,

supra, 34 Cal.App.4th at p. 704.) Inasmuch as further inquiry would have availed nothing, we need not remand for a further hearing.

Instruction on Reasonable Doubt

Prior to jury selection, the trial court gave the prospective jurors some introductory instructions. As part of these instructions, it told the prospective jurors: "You are going to judge whether or not the testimony is reliable. Whether it makes sense. Whether it is reasonable. You are going to do probably what you do regularly in your normal lives, which is to take in information, assess it using common sense and then make decisions. There is nothing magical about your job here. . . ."

In defendant's view, this instruction told the jury that the reasonable doubt standard by which they were to judge the evidence was equivalent to a common sense standard of assessing information that they used in their daily lives. In doing so, it reduced the reasonable doubt standard of proof.[7]

Our Supreme Court long ago observed that "[t]he judgment of a reasonable man in the ordinary affairs of life, however important, is influenced and controlled by the preponderance of evidence. Juries are permitted and instructed to apply the same rule to the determination of civil actions involving rights of property only. But in the decision of a criminal case involving life or liberty, something further is required." (*People v. Brannon* (1873) 47 Cal. 96, 97.) Relying on this principle, this court has held that a jury instruction which suggests that the jurors use the same judgment in determining reasonable doubt as they would in conducting the ordinary affairs of life lowers the requisite burden of proof and constitutes error. (*People v. Johnson* (2004) 115 Cal.App.4th 1169, 1172.)

Here, the trial court did not instruct the jury that reasonable doubt was to be determined the same way jurors made other decisions in their normal lives, assessing the

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[7] The jury was instructed with CALJIC 2.90 on reasonable doubt in the concluding instructions.

question using common sense. It instructed the jury to judge the reliability of the testimony by this standard. Instructing the jury to assess the reliability and significance of the evidence using a common sense standard is permissible. (See, e.g., *People v. Bolin* (1998) 18 Cal.4th 297, 327.) Hence, the trial court did not impermissibly lower the prosecution's burden of proof with its introductory instruction.

Marsden Motion

After the jury verdicts were recorded, defendant indicated that he wanted to make a *Marsden* motion. The court agreed to hear the motion at the next hearing. At that hearing, defendant explained that he and Attorney Kessler were "not dealing with the same case here." Attorney Kessler did not understand his situation and was not representing him to the best of his ability. When asked for specific complaints, defendant complained that Attorney Kessler did not call any witnesses or file any motions on his behalf. The trial court asked what witnesses he wanted called. Defendant said the attorney should have called the person who worked at the prop studio where Edmund said he left defendant's knife after taking it from him. Defendant acknowledged, however, that he never found out who that person was. The court then asked what motions defendant wanted Attorney Kessler to file. Defendant said that he did not know, but Attorney Kessler and the court should know.

Attorney Kessler responded that defendant's investigators had gone out "to find anything [they] could about the knife." Attorney Kessler also "went to the location. [Defendant] has had three investigators. If I thought they had anything to offer affirmative, I would have produced that." He did not think evidence about recovery of the knife would have been helpful to defendant's case.

Defendant then added, "Also, in the mi[d]st of the trial when we were picking the jury, I kept asking Mr. Kessler about having African Americans on the jury panel. There was one guy—I don't know what number it is now—he used to be the 9th juror. I think he was in New York with a friend of his and had gotten robbed or something like that. I kept talking to Mr. Kessler. During the picking of the jury I wanted somebody Black on

the jury. He picked that one guy. He said I don't like him because of what happened to him. I don't think he will be good. I told Mr. Kessler I don't care. I need somebody Black on the jury.

"Ms. Toney [the prosecutor] kept kicking people off that was Black. I thought that was intentional. Not until after I was back in my dorm and I called different appeal attorneys, I spoke to Jonathan Moore. He asked me, are you African American? I said yes. He said did your lawyer file a motion to sit up there because of racial profiling? I said why would you ask me that question? He told me what the name of the motion that could have been filed. I told him no."

At this point, the trial court interrupted and told him, "If you have a specific complaint about Mr. Kessler that causes you to feel the court should fire him and give you a different lawyer, then you need to state it now." Defendant reiterated that Attorney Kessler was not fighting for him, did not do anything he asked him to and had not respected him. The court told him that it had no legal basis to remove Attorney Kessler, and it denied defendant's motion.

Defendant claims the trial court erred in denying his *Marsden* motion based on Attorney Kessler's failure to make a *Wheeler* motion challenging the prosecution's exercise of peremptory challenges to excuse Black jurors. In ruling on a *Marsden* motion, the question before the trial court is whether "the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." (*People v. Welch* (1999) 20 Cal.4th 701, 728, internal quotation marks omitted; *People v. Memro* (1995) 11 Cal.4th 786, 857.) The decision whether or not to allow the defendant to substitute counsel rests within the sound discretion of the trial court """"unless there is a sufficient showing that the defendant's right to the assistance of counsel would be substantially impaired if his present request was denied."""" (*People v. Burton*, *supra*, 48 Cal.3d at p. 855; accord, *Memro*, *supra*, at p. 857.)

It is important to note that "[a] defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense. [Citation.] Tactical disagreements between the defendant and his attorney do not by themselves constitute an 'irreconcilable conflict.' 'When a defendant chooses to be represented by professional counsel, that counsel is "captain of the ship" and can make all but a few fundamental decisions for the defendant.' [Citation.]" (*People v. Welch*, *supra*, 20 Cal.4th at pp. 728-729.)

Neither does a lack of rapport or a lack of trust between defendant and counsel require that a motion to substitute counsel be granted. (*People v. Memro*, *supra*, 11 Cal.4th at p. 857.) "'[T]he Sixth Amendment does not guarantee a "'meaningful relationship' between an accused and his counsel." [Citation.]'" (*People v. Clark*, *supra*, 3 Cal.4th at p. 100.)

All of defendant's complaints were aimed at Attorney Kessler's past tactical decisions in the conduct of the trial and defendant's unhappiness at the way he perceived his attorney was representing him. None was sufficient to entitle defendant to substitution of counsel. (*People v. Welch*, *supra*, 20 Cal.4th at pp. 728-729; *People v. Memro*, *supra*, 11 Cal.4th at p. 857.) That Attorney Kessler may have excused a Black juror for legitimate tactical reasons when defendant wanted him on the jury merely because he was Black was not grounds for relief. (*Welch*, *supra*, at pp. 728-729.) Defendant failed to show that Attorney Kessler's representation was inadequate in the past or that ineffective assistance of counsel was likely to result if he were required to proceed with the remainder of trial under Attorney Kessler's representation. The trial court therefore did not abuse its discretion in denying defendant's *Marsden* motion. (*Memro*, *supra*, at p. 857; *People v. Burton*, *supra*, 48 Cal.3d at p. 855.)

As to defendant's complaint about Attorney Kessler's failure to make a *Wheeler* motion, defendant failed to make a record establishing that his attorney's failure to make a *Wheeler* motion constituted ineffective assistance of counsel, entitled defendant to substitution of counsel or entitles defendant to reversal of his conviction.

A party's use of peremptory challenges is presumed to be valid. (*People v. Williams* (1997) 16 Cal.4th 153, 187; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 278.) Counsel may excuse potential jurors based on hunches or for arbitrary reasons, so long as they are unrelated to impermissible group bias. (*People v. Box* (2000) 23 Cal.4th 1153, 1186, fn. 6; *People v. Turner* (1994) 8 Cal.4th 137, 165, disapproved on another ground in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.) Thus, the burden is on the complaining party to make a prima facie showing that the peremptory challenges have been exercised in violation of the Constitution. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1216; see *People v. Crittenden* (1994) 9 Cal.4th 83, 115.)

A prima facie case requires the making of as complete a record as possible, establishing the persons excluded are a cognizable group, and showing from all the circumstances of the case that there is a strong likelihood the persons are excluded because of their group association. (*People v. Box*, *supra*, 23 Cal.4th at pp. 1187-1188; *People v. Williams*, *supra*, 16 Cal.4th at p. 187.) Factors pertinent to the determination include the character and substance of voir dire, whether a disproportionate number of peremptory challenges have been used against members of the identified group, the race or ethnicity of the defendant vis-à-vis members of the identified group and remaining jurors or victim, and whether the excluded jurors had characteristics in common other than their membership in the cognizable group. (See *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) "[M]erely alluding to the fact a party has used its peremptory challenges to exclude members of a particular group" is insufficient to meet the burden of establishing a prima facie case. (*People v. Trevino* (1997) 55 Cal.App.4th 396, 406.)

Defendant did not establish a prima facie case of impermissible use of peremptory challenges to exclude Black jurors from the panel; he merely alluded to the fact that the prosecutor used peremptory challenges to exclude Black jurors. (*People v. Trevino*, *supra*, 55 Cal.App.4th at p. 406.) He therefore established no basis for relief.

The judgment is affirmed.

NOT TO BE PUBLISHED

SPENCER, P. J.

We concur:

VOGEL, J.

ROTHSCHILD, J.